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Nos. 08-1520 and 08-1524

In the Supreme Court of the United States

CITY OF DALLAS, TEXAS, PETITIONER

v.

ROWAN W. GOULD, DIRECTOR, UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.

TEXAS WATER DEVELOPMENT BOARD, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
IGNACIA S. MORENO
Assistant Attorney General
ANNA T. KATSELAS
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Whether the court of appeals correctly held that the United States Fish and Wildlife Service's environmental assessment and finding of no significant environmental impact, pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, with respect to the Service's designation of boundaries for a new National Wildlife Refuge, were not arbitrary and capricious.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statement 2
Argument 8
Conclusion 19

TABLE OF AUTHORITIES

Cases:

Andrus v. *Sierra Club*, 442 U.S. 347 (1979) 3
Catron County Bd. of Comm'rs v. *United States Fish & Wildlife Serv.*, 75 F.3d 1429 (10th Cir. 1996) 16, 17
Center for Biological Diversity v. *National Highway Traffic Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008) 14
Davis v. *Mineta*, 302 F.3d 1104 (10th Cir. 2002) 14
Department of Transp. v. *Public Citizen*, 541 U.S. 752 (2004) ..... *passim*
Douglas County v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 516 U.S. 1042 (1996) 17
Highway J Citizens Group v. *Mineta*, 349 F.3d 938 (7th Cir. 2003), cert. denied, 541 U.S. 974 (2004) 13
Idaho Sporting Congress Inc. v. *Alexander*, 222 F.3d 562 (9th Cir. 2000) 16
Kern v. *United States Bureau of Land Mgmt.*, 284 F.3d 1062 (9th Cir. 2002) 11
Marsh v. *Oregon Natural Res. Council*, 490 U.S. 360 (1989) 4

Cases—Continued: Page

Methow Valley Citizens Council v. *Regional Forester*, 833 F.2d 810 (9th Cir. 1987), rev'd on other grounds *sub nom. Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989) 15

Metropolitan Edison Co. v. *People Against Nuclear Energy*, 460 U.S. 766 (1983) 9, 10, 11

Muckleshoot Indian Tribe v. *USFS*, 177 F.3d 800 (9th Cir. 1999) 14

New Mexico ex rel. Richardson v. *Bureau of Land Mgmt.*, 565 F.3d 683 (10th Cir. 2009) 16

Oregon Natural Res. Council v. *Marsh*, 832 F.2d 1489 (9th Cir. 1987), rev'd on other grounds, 490 U.S. 360 (1989) 11

Oregon Natural Res. Council Fund v. *Brong*, 492 F.3d 1120 (9th Cir. 2007) 11

Oregon Natural Res. Council Fund v. *Goodman*, 505 F.3d 884 (9th Cir. 2007) 11

Robertson v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989) 3

Sabine River Auth. v. *United States Dep't of the Interior*, 951 F.2d 669 (5th Cir.), cert. denied, 506 U.S. 823 (1992) 8, 18

Save Our Sonoran, Inc. v. *Flowers*, 408 F.3d 1113 (9th Cir. 2005) 11

Scientists' Inst. for Pub. Info., Inc. v. *AEC*, 481 F.2d 1079 (D.C. Cir. 1973) 12

Seattle Audubon Soc'y v. *Espy*, 998 F.2d 699 (9th Cir. 1993) 16

Selkirk Conservation Alliance v. *Forsgren*, 336 F.3d 944 (9th Cir. 2003) 12

Cases—Continued: Page

Sierra Club v. *Marsh*, 769 F.2d 868 (1st Cir. 1985) 12
Simmons v. *United States Army Corps of Eng'rs*, 120 F.3d 664 (7th Cir. 1997) 14
Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1978) 3, 16

Constitution, statutes and regulations:

U.S. Const. Amend. X 13
Endangered Species Act, 16 U.S.C. 1531 *et seq.* 16
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 2
42 U.S.C. 4332(2)(C) 2, 3
16 U.S.C. 668dd(a)(1) 2
16 U.S.C. 668dd(a)(2) 2
16 U.S.C. 668dd(a)(4)(C) 3
40 C.F.R.:
Section 1500.3 3
Section 1501.3 3
Section 1501.4 3
Section 1501.4(e) 3
Section 1502.24 16
Section 1506.2(b) 13
Section 1508.9(a) 3
Section 1508.9(a)(1) 3, 15
Section 1508.13 3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 562 F.3d 712. The opinion of the district court (Pet. App. 21a-59a) is unreported.[1]

[1] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and petition appendix in No. 08-1520.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 2009. The petitions for a writ of certiorari were filed on June 10, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, requires federal agencies to examine the environmental effects of proposed federal actions and to inform the public about those effects. 42 U.S.C. 4332(2)(C). Pursuant to NEPA and its implementing regulations, the United States Fish and Wildlife Service (FWS) prepared an environmental assessment of the environmental impact of establishing the Neches Wildlife Refuge along the Upper Neches River in Texas, and concluded that no significant environmental impact would arise, obviating the need to undertake a more detailed environmental impact statement. Petitioners challenged that decision as arbitrary and capricious. The district court granted FWS's motion for summary judgment and its motion to dismiss petitioners' NEPA claims. Pet. App. 21a-59a. The court of appeals affirmed. *Id.* at 1a-20a.

1. a. The Secretary of the Interior, through FWS, is charged with administering the National Wildlife Refuge System (System). 16 U.S.C. 668dd(a)(1). The System's purpose is to establish and "administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans." 16 U.S.C. 668dd(a)(2). In administering the System, the Secretary is required to,

among other things, "plan and direct the continued growth of the System in a manner that is best designed to accomplish [its] mission," and "to contribute to the conservation of the ecosystems of the United States." 16 U.S.C. 668dd(a)(4)(C).

b. Under NEPA, whenever an agency proposes a "major Federal action[] significantly affecting the quality of the human environment," it must prepare a detailed statement on the environmental impact of the proposed action, termed an environmental impact statement (EIS). 42 U.S.C. 4332(2)(C). The Council on Environmental Quality (CEQ) has promulgated regulations to guide federal agencies in determining what actions are subject to that statutory requirement. See 40 C.F.R. 1500.3; *Andrus* v. *Sierra Club*, 442 U.S. 347, 357 (1979). The CEQ regulations allow an agency to comply with NEPA by preparing a more limited document, known as an environmental assessment (EA), in order to determine whether a full EIS is necessary. See 40 C.F.R. 1501.3, 1501.4. An EA is a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]." 40 C.F.R. 1508.9(a) and (a)(1). If the agency determines on the basis of the EA that an EIS is not required, then it must issue a "finding of no significant impact," which is a document "briefly presenting" the reasons that the agency action will not have a significant impact on the human environment. 40 C.F.R. 1501.4(e), 1508.13.

NEPA does not mandate particular substantive results, but instead simply prescribes the necessary process to ensure that agencies are fully informed with respect to the environmental consequences of their proposed projects. See *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350-351 (1989); *Vermont*

Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519, 558 (1978). "[I]nherent" in NEPA's procedural requirements is a "rule of reason" that relieves agencies of the obligation to consider every conceivable environmental effect, if doing so would be of little value to the decision-making process. *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 767-768 (2004); *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 373 (1989). Thus, an agency must consider an environmental effect of a proposed major federal action only if there is "a reasonably close causal relationship between the environmental effect and the alleged cause." *Public Citizen*, 541 U.S. at 767 (internal quotation marks omitted). This Court has "analogized this requirement to the familiar doctrine of proximate cause from tort law." *Ibid.*

2. In 1961, the State of Texas identified the Upper Neches River area as a potential site on which to build a water-supply reservoir, known as the Fastrill Reservoir. Pet. App. 2a. For more than forty years, petitioners took no substantial steps towards planning, analyzing or building the reservoir, but periodically listed the site in state and local water plans as one of a number of potentially suitable reservoir sites. *Id.* at 2a-3a. When mentioned, the reservoir was described as potentially being constructed in 2050 and tapped in 2060. *Id.* at 2a, 37a.

In 1985, FWS identified the Upper Neches River area as an ecologically important bottomland hardwood habitat, and labeled the site as a high priority for protection. Pet. App. 2a-3a. The bottomland ecosystem supports a diverse array of plants and animals, and contains important wintering habitats for various waterfowl species. Gov't R.E. 3518-3519. FWS prepared a preliminary refuge proposal in 1988 and subsequently pre-

pared, but did not publish, a draft EA. Pet. App. 3a. FWS did not proceed with the proposal at that time largely because of a lack of funding. *Ibid.*

In 2003, FWS reactivated the project because of large-scale timber divestment occurring along the Neches River. Gov't C.A. Br. 10. In June 2004, FWS officially introduced to the public the study for the proposed refuge. *Ibid.* FWS held public workshops in July 2004 and made a presentation about the project to the East Texas Regional Water Planning Group and other interested members of the public in October 2004. Pet. App. 3a, 57a.

With information generated from the study phase, FWS prepared an EA addressing the potential impacts of the proposed project, and also prepared land protection and concept management plans. The EA evaluated three alternatives, including: (1) a "no action" alternative; (2) the recommended 25,281-acre configuration; and (3) a narrower 15,294-acre configuration. Pet. App. 3a. The EA acknowledged the reservoir proposal, and noted that only the no-action alternative would preserve the possibility that the reservoir could be built, because the reservoir could not be constructed on land designated as a wildlife refuge absent congressional action. *Id.* at 3a, 42a; Gov't R.E. 3539, 3543. But because no feasibility study had been conducted and the precise location of the reservoir was undecided, the EA concluded that the reservoir project was speculative, and that it was impossible to meaningfully assess whether and how the refuge and reservoir plans might interface.[2] Pet. App. 42a; Gov't R.E. 3534.

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[2] In March 2005, having learned of FWS's renewed consideration of the refuge site, the City had commissioned a feasibility study, but it was not yet complete. Pet. App. 3a; Gov't C.A. Br. 10, 13-14.

In May 2005, FWS distributed the EA to public officials and interested groups and held two public hearings. Pet. App. 3a, 57a. Petitioners were invited to participate in the comment process and meetings, but they did not submit any proposals for alternative refuge sites or for developing both the refuge and the reservoir. *Id.* at 55a, 57a. FWS received more than 1,600 comments on the proposal, the majority of which favored establishment of the Refuge. *Id.* at 3a, 57a; Gov't C.A. Br. 12. FWS responded to comments from governmental agencies, including petitioners, regarding the future prospects for a reservoir within the boundaries of the proposed Refuge, Pet. App. 57a, and pointed out that if the Refuge was established, state officials could request that Congress authorize the Secretary to take the necessary steps to allow the construction of the reservoir. Gov't C.A. Br. 12. On July 28, 2005, FWS determined that an EIS was unnecessary and issued a Finding of No Significant Impact (FONSI). Pet. App. 3a.

In August 2005, shortly after FWS issued the FONSI, the Texas legislature designated the reservoir a "critical resource." Pet. App. 3a-4a. Throughout early 2006, FWS repeatedly met with representatives of the City of Dallas (City) and other entities to determine whether an alternative refuge site of equal or greater ecological value could be identified. *Id.* at 4a.

FWS set a June 1, 2006, deadline for its decision whether to designate the area as a wildlife refuge. Pet. App. 54a. At that point, the City's feasibility study had not yet been completed, and no concrete steps toward development of the reservoir, such as applying for permits, had been taken. *Id.* at 4a. Moreover, the Director of the Texas Parks and Wildlife Department had informed FWS that no viable alternative refuge site had

been identified. Gov't C.A. Br. 14. FWS issued its final decision approving the 25,281-acre Refuge boundary on June 11, 2006, and shortly thereafter accepted a conservation easement from a landowner within the acquisition boundary. *Id.* at 4a; Gov't C.A. Br. 14.

3. In January 2007, petitioners filed suit against respondents in the United States District Court for the Northern District of Texas, alleging, *inter alia*, that FWS's EA was insufficient and its decision not to undertake an EIS was arbitrary and capricious, in violation of NEPA. Pet. App. 4a. The district court granted partial summary judgment to FWS, rejecting petitioners' assertions that FWS had failed adequately to consider the impact of its refuge designation on the prospects for a reservoir, had failed to consider alternative proposals, and had relied on outdated data. *Id.* at 21a-59a.

4. The court of appeals affirmed. Pet. App. 1a-20a. Reviewing the sufficiency of FWS's EA under the arbitrary-and-capricious standard, see *Public Citizen*, 541 U.S. at 763, the court first found that FWS had not acted arbitrarily and capriciously in declining to analyze the potential effects of the refuge designation on future water supplies, Pet. App. 5a-6a, 10a-11a. In view of the uncertainty about whether the reservoir would ever have been constructed and its role in supplying the region's future water needs, the court held that the refuge designation could not be considered the proximate cause of any effect on water supplies. *Id.* at 6a-9a. The court also concluded that the EA considered an adequate range of alternatives, and that in any event, petitioners failed to proffer viable alternative proposals to FWS during the comment period and the subsequent discussions. *Id.* at 9a-10a. The court also rejected petitioners' contention that FWS arbitrarily relied on outdated data

that were insufficient to permit a reasoned decision, *id.* at 11a-13a, and upheld FWS's choice of a 20-year time horizon as reasonable, *id.* at 13a-14a.

Finally, the court upheld FWS's decision not to undertake an EIS as not arbitrary and capricious in view of FWS's "reasoned decision," in its EA, "that there were no significant environmental effects." Pet. App. 17a. The court also rejected the Texas Water Development Board's (TWDB) argument that the refuge designation itself would have significant physical effects on the environment, noting that the designation itself would not change the physical attributes or the maintenance of the land. *Id.* at 18a-19a (citing *Sabine River Auth.* v. *United States Dep't of the Interior*, 951 F.2d 669 (5th Cir.), cert. denied, 506 U.S. 823 (1992)).

ARGUMENT

Petitioners renew their contention that FWS acted arbitrarily and capriciously in crafting its EA, and in concluding that the refuge designation would have no significant environmental impact. The court of appeals correctly rejected petitioners' arguments, and its fact-bound decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioners first contend (Pet. 11-29; 08-1524 Pet. 23-31) that FWS's EA was insufficient because it failed to consider the effects on the state and city water supplies that might result from not building the reservoir, as well as effects on as-yet undetermined alternative sites where petitioners might in the future decide to build a reservoir.

a. The court of appeals correctly held that FWS was not required to analyze the refuge designation's poten-

tial effects on future water supplies and urban planning because any such effects would not be proximately caused by FWS's action. Pet. App. 9a-11a. Petitioners acknowledge (Pet. 12; 08-1524 Pet. 24) that FWS was required only to consider proximately related, reasonably foreseeable impacts of its action, see *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 767 (2004), and they do not contend that the court of appeals did not apply this standard, see Pet. App. 9a. Rather, petitioners challenge the court of appeals' fact-bound conclusion that FWS permissibly determined that the reservoir-related effects were not reasonably foreseeable.

As FWS and the court of appeals found, the connection between FWS's establishment of the refuge boundary and the alleged effects on the City's water supply is far too attenuated to fall within NEPA's sphere. See *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 772-774 (1983). Petitioners "never committed to constructing the reservoir and may never have done so." Pet. App. 11a. Petitioners had not taken any concrete steps "such as seeking permits, acquiring property, or commencing any of the hydrological, fiscal, or environmental studies necessary to a major public works project." *Ibid.* As a result, petitioners might have decided not to construct the reservoir for any number of reasons that would be unrelated to FWS's action—for instance, if eventual studies showed that the reservoir was impracticable. Reflecting the tentative nature of petitioners' plans, petitioners "never identified the precise role the reservoir—even if constructed and tapped in 2060—will play in supplying the region's" water. *Ibid.* NEPA does not require agencies to attempt to analyze effects that are susceptible to innumerable intervening occurrences that could break the causal

chain leading from the federal action at issue. See *Metropolitan Edison*, 460 U.S. at 772-774; *Public Citizen*, 541 U.S. at 767 (courts must draw a "manageable line" respecting causation).

TWDB also contends (08-1524 Pet. 24-27) that FWS was required to analyze a sweeping range of potential effects that allegedly might flow from not constructing the reservoir, including the environmental effects of constructing a reservoir on a different, as-yet-undetermined site. But the court of appeals correctly concluded that an analysis of the impact of establishing the refuge boundary on future decisions by others about what water sources to develop in the future, and the effects of such unknown decisions on future water supply problems in the region, could not be based on anything but conjecture. Pet. App. 11a. NEPA does not require agencies to engage in projections that would be too speculative to aid the decision-making process. See *Public Citizen*, 541 U.S. at 767 ("inherent in NEPA and its implementing regulations is a 'rule of reason'"); *Metropolitan Edison*, 460 U.S. at 776.

b. The City contends (Pet. 26-29) that the court of appeals' conclusion that the designation of the refuge would not proximately cause effects on future water supplies conflicts with this Court's decisions in *Public Citizen* and *Metropolitan Edison*. In *Public Citizen*, the Court upheld the agency's decision not to address in its EA the environmental effects of allowing Mexican trucks to drive into the United States, because the agency had "no ability categorically to prevent the cross-border operations of Mexican motor carriers." 541 U.S. at 768. Contrary to the City's contentions (Pet. 27), that conclusion does not mean, nor did this Court suggest, that an agency must invariably consider all effects

that it "has authority to create or prevent," even if those effects are not proximately related to the action at issue. See *Oregon Natural Res. Council Fund* v. *Brong*, 492 F.3d 1120, 1134 n.20 (9th Cir. 2007) (agency should consider proximate effects it has authority to prevent). Rather, in emphasizing that NEPA is intended to impose a manageable, not unlimited, obligation to consider effects proximately caused by the proposed action, *Public Citizen* supports the court of appeals' decision. 541 U.S. at 767-768. *Metropolitan Edison*, 460 U.S. at 774, is to the same effect.

c. The City also argues (Pet. 11-12, 16-17) that the court's proximate-cause holding conflicts with decisions of other courts of appeals. The cases on which petitioners rely, however, simply applied the proximate-cause standard to distinguishable factual scenarios in which the relevant agency had failed to assess the effects of currently existing circumstances or virtually inevitable future actions, often in the context of the more detailed analysis necessary in an EIS. See *Oregon Natural Res. Council Fund* v. *Goodman*, 505 F.3d 884, 892-893 (9th Cir. 2007) (EIS for the expansion of a ski area must consider cumulative impacts in light of two other already-scheduled projects in the area); *Save Our Sonoran, Inc.* v. *Flowers*, 408 F.3d 1113, 1121-1123 (9th Cir. 2005) (agency analysis was artificially limited to a portion of the planned development project); *Kern* v. *United States Bureau of Land Mgmt.*, 284 F.3d 1062, 1072-1073, 1075 (9th Cir. 2002) (addressing agency's failure to consider effect of timber sales on spread of fungus in surrounding areas); *Oregon Natural Res. Council* v. *Marsh*, 832 F.2d 1489, 1498 (9th Cir. 1987), rev'd on other grounds, 490 U.S. 360 (1989) (EIS did not adequately consider proposed dam's impact in conjunction with existing dams in

the area); *Sierra Club* v. *Marsh*, 769 F.2d 868, 872, 878 (1st Cir. 1985) (NEPA analysis must consider effects of building a cargo port and causeway on an island in light of second planned phase of industrial development, which consisted of detailed plans and which was virtually certain to occur); *Scientists' Inst. for Pub. Info., Inc.* v. *AEC*, 481 F.2d 1079, 1085-1093 (D.C. Cir. 1973) (rejecting argument that NEPA did not apply at all to a technology development program). In sum, as the court of appeals observed, petitioners have pointed to no case requiring an agency to analyze the effects of its action on a proposed but highly contingent future project.[3] Pet. App. 10a-11a.

d. The City also contends (Pet. 23-25) that the court of appeals' decision leaves "federal agencies * * * free to ignore" state and local water-management plans, raising federalism concerns. FWS did not "ignore" petitioners' water-supply plans, however; it consulted extensively with state and local authorities throughout the decision-making process, even long after the FONSI was complete, and reasonably determined that the possibility of a reservoir was too speculative to be proximately affected by the refuge designation. NEPA does not require any more than that. To the extent petitioners contend that FWS's substantive decision to desig-

[3] Petitioners also argue (Pet. 17-18; 08-1524 Pet. 28-31) that the 20-year time horizon selected by FWS was arbitrary and capricious. The court of appeals correctly rejected that argument. Pet. App. 13a-14a. The decisions that petitioners assert conflict with the court's conclusion simply evaluated specific time horizons in light of the action at issue. See, *e.g.*, *Selkirk Conservation Alliance* v. *Forsgren*, 336 F.3d 944, 962-963 (9th Cir. 2003). And in any event, FWS's decision not to further address the potential impact of not building the reservoir was based on its reasonable conclusion that the reservoir might not be built at all—a conclusion that did not depend on any particular time horizon.

nate the refuge notwithstanding petitioners' objections impinged on state sovereignty, NEPA—a procedural statute—does not provide a vehicle for such a challenge. And although petitioners asserted Tenth Amendment claims below, they have not renewed those claims, which the court of appeals rejected as meritless and waived, before this Court.[4] Pet. i; 08-1524 Pet. i.

2. The City next contends (Pet. 18-21) that FWS arbitrarily and capriciously failed to consider an adequate range of alternatives, including alternatives that would have permitted both the reservoir and the refuge to be built. But an EA need only consider a reasonable range of alternatives that would serve the purpose of the proposed project. See, *e.g.*, *Highway J Citizens Group* v. *Mineta*, 349 F.3d 938, 960 (7th Cir. 2003), cert. denied, 541 U.S. 974 (2004). Here, the court of appeals correctly upheld FWS's conclusion that it could not evaluate a dual-use proposal without knowing any specifics as to where a reservoir might be built; how large it would be; and whether it would be built at all. Pet. App. 9a.

In any event, petitioners made clear after the comment period had closed that they believed that the reservoir and the refuge could not co-exist, as their alternative proposals all would have required FWS to abandon the Upper Neches site entirely, and would have destroyed a significant portion of the riparian corridor. Pet. App. 9a. But as the court of appeals found, preserving the Upper Neches habitat was the very purpose of

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[4] FWS also did not contravene 40 C.F.R. 1506.2(b), which requires agencies to coordinate with state and local agencies. See 08-1524 Pet. 28. By its terms, that provision is directed to minimizing "duplication between NEPA and State and local requirements," not the circumstances in which an agency may decline to consider a possible impact on a state proposal.

the contemplated action. *Ibid.*; *id.* at 3a; Gov't R.E. 3517-3518. Petitioners point to no decision suggesting that NEPA required FWS to consider alternatives that would obviate the purpose of the planned action.[5]

None of the decisions on which petitioners rely (Pet. 20-23) conflicts with the court of appeals' holding, as all evaluated the relevant agency's consideration of alternatives in light of the specific facts of each case, often in the context of reviewing the more extensive analysis required in an EIS. See, *e.g.*, *Center for Biological Diversity* v. *National Highway Traffic Safety Admin.*, 538 F.3d 1172, 1218 (9th Cir. 2008) (agency refused to consider reasonable, less environmentally damaging alternatives submitted by parties); *Davis* v. *Mineta*, 302 F.3d 1104, 1120-1122 (10th Cir. 2002) (agency refused to consider in EA proposed alternatives that were feasible and less damaging to the environment); *Muckleshoot Indian Tribe* v. *USFS*, 177 F.3d 800, 813 (9th Cir. 1999) (EIS involving transfer of old-growth forest to private companies insufficient where agency failed to consider alternatives that would have been more protective of the forest and therefore more consistent with agency's stated policy goals); *Simmons* v. *United States Army Corps of Eng'rs*, 120 F.3d 664, 669-670 (7th Cir. 1997) (agency may not artificially limit its consideration of viable alternatives to those preferred by the beneficiary of the pro-

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[5] As the court of appeals noted, Pet. App. 9a, even had these alternatives been consonant with the purpose of the designation, they were not presented during the comment period. See *Public Citizen*, 541 U.S. at 764-765 (challengers should present proposed alternatives during the comment period). Contrary to the City's suggestion (Pet. 22), requiring those challenging an EA to present proposed alternatives during the comment period does not improperly "shift[] the burden" of compliance with NEPA.

ject); *Methow Valley Citizens Council* v. *Regional Forester*, 833 F.2d 810, 815 (9th Cir. 1987) (EIS, which must consider "every" reasonable alternative, should have considered alternative locations because the proposed action was not tied to a particular location), rev'd on other grounds *sub nom. Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989); see also Pet. 21-22 (citing decisions and regulations applying to EIS).

3. The City next contends (Pet. 29-34) that FWS relied on "outdated" data in its EA, pointing to FWS's use of some data from its 1988 EA. Pet. 32. The only allegedly outdated data that the City identifies, however, related to the amount of bottomland hardwood cover; the City contends that the hardwood cover on the refuge site had diminished in the interval between 1988 and 2004, making the Upper Neches site less effective as a wildlife refuge. *Ibid.* But an EA need only contain "sufficient" information to enable the agency to decide whether an EIS is necessary, 40 C.F.R. 1508.9(a)(1), and FWS performed its own examination of the site in 2004, concluding that notwithstanding hardwood diminishment, the site remained appropriate for the refuge. Pet. App. 48a. The court of appeals correctly held that that was sufficient for purposes of an EA.[6] *Id.* at 12a-13a; see *Public Citizen*, 541 U.S. at 767 (noting "rule of rea-

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[6] The court did not assume, as the City suggests (Pet. 33), that reliable data were not necessary because the refuge designation was conservation-related. Rather, the court distinguished the decisions on which petitioners relied as involving situations in which the agency was considering whether to undertake environmentally harmful actions, and failed to obtain adequate data on the extent of the potential effects. Pet. App. 12a. Here, the City challenges FWS's reliance on its own examination (as well as data) in applying its expert judgment and concluding that the refuge site was an important habitat that should be preserved.

son" applicable to EAs). The City's argument therefore reduces to a disagreement with FWS's ultimate decision to designate the refuge. But NEPA requires only that the agency make an informed decision; it does not require an agency to reach any particular substantive result. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978).

In arguing that the court of appeals' decision deviates from those of other circuits, the City relies (Pet. 31-32 & n.14) on inapposite cases concerning the "scientific integrity" requirements applicable to an EIS under 40 C.F.R. 1502.24, or procedural situations not presented here. See, *e.g.*, *New Mexico ex rel. Richardson* v. *Bureau of Land Mgmt.*, 565 F.3d 683, 704-707 (10th Cir. 2009) (evaluating sufficiency of data in EIS); *Idaho Sporting Congress Inc.* v. *Alexander*, 222 F.3d 562, 567 (9th Cir. 2000) (disapproving use of supplemental reports to present omitted data because such reports are not contemplated by NEPA or its regulations); *Seattle Audubon Soc'y* v. *Espy*, 998 F.2d 699, 704-705 (9th Cir. 1993) (EIS for adoption of spotted owl management plan failed to consider new scientific uncertainty regarding evidence on which the agency's strategy rested).

4. TWDB next contends (08-1524 Pet. 32-37) that the court of appeals' holding that FWS reasonably concluded no EIS was necessary conflicts with the Tenth Circuit's decision in *Catron County Board of Commissioners* v. *United States Fish & Wildlife Serv.*, 75 F.3d 1429 (1996) (*Catron County*). TWDB is incorrect.

In *Catron Country*, FWS argued that it was not required to consider the environmental impact of its designation of a critical habitat under the Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*, because the ESA entirely superseded NEPA's requirements. In support

of that argument, FWS contended that NEPA compliance was unnecessary because a critical-habitat designation could have only beneficial environmental effects. *Catron County*, 75 F.3d at 1437. In rejecting that position, the court stated that NEPA broadly applies to all federal action, regardless of whether a proposed action is projected to have a beneficial or detrimental effect on the environment, and it also noted that the fact that the action in question was taken pursuant to the ESA did not necessarily mean that it would have no detrimental effects on other aspects of the environment. *Ibid.*

Because the only question at issue in *Catron County* was whether the agency's action was entirely exempt from NEPA's requirements, the court had no occasion to consider when an agency proceeding in accordance with NEPA need not undertake an EIS. Here, in contrast, FWS has never contended that NEPA does not apply to the designation of the refuge. Rather, the agency complied with NEPA's framework, and determined that its action would have no significant environmental effects necessitating an EIS. The court of appeals approved that determination because FWS complied with NEPA in preparing an EA, "made a reasoned decision that there were no significant environmental effects" flowing from the establishment of an acquisition boundary, and "properly * * * made a FONSI." Pet. App. 17a; see *Public Citizen*, 541 U.S. at 764. There is thus no conflict between the decision below and *Catron County*.[7]

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[7] For the same reasons, any conflict between *Catron County* and *Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 516 U.S. 1042 (1996), which held that the ESA's procedures superseded NEPA (see 08-1524 Pet. 34-35), is not implicated here.

Nonetheless, TWDB suggests (08-1524 Pet. 35-36) that the court of appeals assumed that all boundary designations and conservation-related actions necessarily will not have any detrimental environmental effects, thereby diverging from *Catron County*. To the contrary, the court simply stated that, in addition to the lack of proximate relation to any effect on the City's water supply, FWS's FONSI was supported by the fact that the designation would not effect any current physical change in the land or alter the way in which the land is currently used. Pet. App. 18a (citing *Sabine River Auth.* v. *United States Dep't of the Interior*, 951 F.2d 669, 680 (5th Cir.), cert. denied, 506 U.S. 823 (1992), which approved a FONSI in similar circumstances, where the boundary designation did not alter the existing land use in any way and any effect on future water supply was not proximately related). The court's approval of the FONSI was thus based on the specific characteristics of the refuge designation at issue in this case.[8] *Id.* at 6a-18a. The court's fact-bound conclusion that FWS reasonably determined that the designation of the refuge would not have a significant impact on the environment is correct, and does not warrant further review.

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[8] Even if the court had made such an assumption, its holding would not conflict with that of *Catron County*, because that decision did not concern the circumstances in which potential environmental effects are significant enough to require an EIS under NEPA.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
IGNACIA S. MORENO
Assistant Attorney General
ANNA T. KATSELAS
Attorney

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